DATE: November 6, 1995

CASE NO: 94-STA-52

Michael K. Cleary,
Complainant

v.

Flint Ink, Corp.,
Respondent

Appearances:

Michael K. Fielo, Esquire
For Complainant

Kevin B. Walker, Esquire
For Respondent

Before: RALPH A. ROMANO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act, hereinafter the "Act", 49 U.S.C. §31105 (1982); which prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities.

Complainant filed his complaint on April 20, 1994, and on August 25, 1994, the Occupational Safety and Health Administration of the U. S. Department of Labor issued its investigative findings to the effect that the complaint had no merit (ALJ 1).[1]

[1] References to the record are: "ALJ" - Administrative Law Judge exhibits; "CX" - Complainant's exhibits; "RX" - Respondent's exhibits; "Tr" - transcript of trial. Noted, is that RX 12 to 14 were not used for identification. Respondent's exhibits thus run from RX 1-11 and RX 15 and RX 16.

Complainant requested a hearing on September 22, 1994 (ALJ 2, 3) and an initial notice of hearing was issued on October 3, 1994 (ALJ 4) upon the September 29, 1994 assignment of this case to the undersigned. After three continuances (ALJ 6, 7, 11)[2], the matter was tried on May 8, 9, 1995 in New York, New York. Briefs were filed by July 21, 1995.

THE LAW

49 U.S.C. §31105. Employee protections

> (a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because -
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> (A) the employee, or another person at the employee's request has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulations, standard, or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because -
>
> (i) the operation violates a regulation, standard, or other of the United States related to commercial motor vehicle safety or health; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
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> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

Complainant argues that Respondent violated section(a)(1)(B)(ii) of the Act in discharging him from its employ on February 8, 1994. He seeks an award for reinstatement, back wages, and attorney's fees (Tr. 8, 9; Compl' Br. at 1, 3).

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[2] A fourth motion to continue the trial was denied (ALJ 15).

Respondent avers that Complainant was discharged for legitimate, non-discriminatory reasons (Tr. 9-12).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

"Under the burdens of proof and production in 'whistleblower' proceedings, Complainant must first make a prima facie showing that protected activity motivated Respondent's decision to take an adverse employment action. Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, non-discriminatory reason. Complainant must then establish that the reason proffered by Respondent is pretextual. At all times, Complainant has the burden of establishing that the real reason for his discharge was discriminatory. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993); Thomas v. Arizona Public Service Co., Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993, slip op. at 20.

In order to establish a prima facie case, a Complainant must show that: (1) he engaged in protected conduct; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against him. Carroll v. Bechtel Power Corp., Case No. 91-ERA-0046, Sec. Dec., Feb. 14, 1995, slip op. at 9, citing Dartey v. Zack Co. of Chicago, Case No. 82-ERA-2, Sec.Dec., Apr. 25, 1983, slip op. at 7-8. Additionally, the Complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Id. See also Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984); McCuistion v. TVA, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. at 5-6. This inference of causation can be raised by the temporary proximity between the protected activity and the adverse action. Zessin v. ASAP Express, Inc., Case No. 92-STA-33, Sec. Dec., January 19, 1993, slip op. at 13; Bergeron v. Aulenback Transp., Inc., 91-STA-38, Sec. Dec., June 4, 1992, slip op. at 3." Williams v. Southern Coaches, Case. No. 94-STA-44 Secty Dec. 9/11/95.

As a preliminary matter, I would note that while Complainant alleges a violation of only section (a)(1)(B)(ii) of the Act, it is unclear whether section (a)(1)(B)(i) of the Act may be involved here. The gravamen of Complainant's case is that he was discharged wrongfully because he refused to drive a vehicle in unsafe weather conditions where, additionally, the vehicle involved was loaded unsuitably for those conditions. Such an allegation may relate to both section (a)(1)(B)(i) - relative to the weather conditions and section (a)(1)(B)(ii) - relative to the vehicle's unsafe condition. While weather conditions certainly find no home in Section (a)(1)(B)(ii) which speaks only of a "...vehicle's unsafe condition...", refusal to operate a vehicle in adverse whether conditions may conceivably fall within

the purview of (a)(1)(B)(i).[3] In any event, giving Complainant every benefit of doubt, I accept Complainant's factual allegations, as to his refusal to operate due to weather conditions, as falling somewhere within the parameters of Section (a)(1)(B), and refuse to sanction him for an inartfully conceived and/or articulated theory of recovery in this regard.

I find that Complainant has established a prima facie of violation of the Act.

On February 8, 1994, Complainant telephoned his supervisor, Donald Witt, and refused to drive one of Respondent's vehicles because of adverse weather conditions (Tr. 25, 27, 30). I find such communication to be an activity protected under Section (a)(1)(A) of the Act. See Yellow Freight Sys. Inc. v. Reich, 27 F.3rd 1333 (6th Cir. 1994), holding that the Act's complaint section protects an employees' safety complaints to managers.

Moreover, insofar as Complainant's communication relative to weather conditions[4], it is clear that Respondent was aware of such protected activity via its supervisor, Donald Witt (Tr. 221, et seq). Also, there is no question that Respondent took some adverse employment action against Complainant, i.e., Complainant was discharged (Tr. 31, 228). Finally, I find that Complainant has established, by inference, that his protected activity was the likely reason for the adverse employment action because of the temporal proximity between the protected activity (February 8, 1994) and the adverse action of the same date, Zessin v. ASAP Express, Inc., Case No. 92-STA-33, Sec. Dec. 1/19/93; Bergeron v. Aulenback Trans., Inc., 91-STA-38, Sec. Dec. 6/4/92.

As far as Complainant's concern about the instability (in adverse weather) of the tanker truck carrying less than a full load (Tr. 25, 26, 42, 56, 57), this record is abundantly clear[5] that Respondent was never made aware of same (Tr. 139, 224, 226, 228). Thus, as Complainant has failed to establish Respondent's awareness of this concern, such concern cannot be considered

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[3] I must assume that the operation of a vehicle in unsafe weather conditions would somehow violate some "...regulation, standard, or order of the United States related to commercial motor vehicle safety or health..." Section (a)(1)(B)(ii). Respondent itself presents a regulation closely mimicking such a scenario (see Resp. Br. at 41).

[4] See infra re Complainant's communication relative to the vehicle's safety condition.

[5] Despite Respondent's counsel's repeated incorrect references in its brief to this record.

protected conduct under the Act, and Complainant's complaint, in this regard, is dismissible on this ground alone[6].

Respondent's position is that Complainant was fired not because of his refusal to take the subject work assignment, i.e., his refusal to drive a vehicle in a snowstorm, but because: (1) Complainant refused such assignment unreasonably prematurely, and (2) Complainant refused to accept Respondent's reasonable offer of an optional work assignment.

The facts, in my view, bear out Respondent's contention.

The originally scheduled run was to begin from New Jersey at midnight on February 8, 1994 for delivery to a new customer in Pittsburgh, Pennsylvania between 10:00 a.m. and 1:00 p.m. on February 9, 1994 (Tr. 20, 21, 23, 275, 276). On the morning of February 8, 1994 at approximately 8:00 a.m., Complainant, having observed the beginnings of a snowstorm, telephoned his supervisor, and, after his request to postpone the run was denied, after another driver (initially) refused to take Complainant's run, and after Complainant refused Respondent's optional offer to start the run earlier, Complainant ultimately refused to take the job assignment (Tr. 23-30; 221-228).

Irrespective of the weather conditions in the a.m. of February 8, 1994, in either New Jersey or Pittsburgh, Pennsylvania, I find that Complainant unreasonably refused to accept Respondent's option to leave earlier on February 8, 1994[7], and proceed toward Pittsburgh as far as safety would permit (Tr. 223).[8] That it was important, from a business prospective, to demonstrate a good faith attempt to deliver to the new customer, was an exclusive, valid, management decision and Complainant had no right to question this decision (Tr. 223). I find no justifiable basis for Complainant's refusal to accept his supervisor's option.

Furthermore, I find it unreasonable for Complainant to have (prematurely) flatly and finally decided to not take the run at

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[6] Also, of course, under Section (a)(2), Complainant would/could not have sought and have been unable to obtain, correction of the alleged unsafe condition from Respondent, without having ever notified Respondent of such condition.

[7] I.e., at any point after the approximately 8:00 a.m. telephone conversation (Tr. 27).

[8] Complainant's implicit suggestion that the unsafe weather conditions prevented his travel from his home to Respondent's depot to begin the run, does not help his position here, as such travel does not appear to be protected under the Act.

8:00 a.m. on February 8, 1994, some sixteen hours prior to the scheduled run start. The more prudent thing to do would have been to wait and observe the storm developments prior to making such decision.

The foregoing unreasonable behavior of Complainant, in my judgment, justified Respondent's discharge. Accordingly, I find such discharge to have been made for valid, non-discriminatory reasons, and that Complainant has failed to establish a violation of the Act.

RECOMMENDED ORDER

On the basis of the foregoing, I recommend the complaint be **DISMISSED.**

RALPH A. ROMANO
Administrative Law Judge

Dated: November 6, 1995
Camden, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in the matter will be forwarded for review by the Secretary of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).